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IN THE

Supreme Court of the United States

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,

Petitioners,

v.

WILLIAM J. CLINTON, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is it consistent with Article III, Section 2 of the United States Constitution and this Court's decisions, for a trial court to dismiss a complaint at the pleading stage based on a lack of proof of Article III standing, even though the allegations of the complaint when reasonably viewed show that (a) plaintiffs have suffered a loss of employment, pay and benefits as the result of the violation of military procurement laws by the defendants and (b) their injuries are redressable?

PARTIES TO THE PROCEEDINGS

In addition to the petitioner named in the caption, the following parties, who were appellants below, petition this Court for a writ of certiorari to the U.S. Court of Appeals for the Sixth Circuit:

> Jim Davis, Scott Blanch, David C. Sheffer, Jesse R. Salcedo, Darrell Williams, Michael D. Dearing, George H. White, Hill/DDO/95 Inc., George Carriker, Harry Burnette, Daniel Sosa, Louis H. Harwell, Jr., Connie K. Scarborough and Luanne Lewis.

In addition to the respondent named in the caption, the following parties, appellees in the proceeding below, are respondents to this petition:

> William E. Perry, John P. White, Sheila Widnall, General Henry Viccellio, Jr., Colonel Joseph Renaud, Major General Eugene L. Tattini, Major General James S. Childress and General Kenneth Eickman.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 180 F.3d 727 (6th Cir. 1999). (App., 1a-12a.) The opinion of the United States District for the Southern District of Ohio is not reported. (App., 13a-14a.)

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1999. (App., 1a-12a.) The appellants' petition for rehearing en banc was denied on September 7, 1999. (App., 39a-40a.) The petition for a writ of certiorari was due on December 6, 1999. This petition was, therefore, timely filed on December 6, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. Section 124.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article III, Section 2 of the Constitution of the United States, 5 U.S.C. Section 702, a section of the Administrative Procedure Act ("APA"), and 10 U.S.C. Sections 2464 (pre-November 18, 1997), 2464 (as of November 18, 1997 and thereafter), 2467 and 2469. (App., 41a-51a.)

STATEMENT

A. Background

Petitioners are thirteen former and present civilian employees of the United States Air Force Materiel Command (AFMC), a union representing those employees, and a community organization which represents the community surrounding the Hill Air Force Base in Ogden, Utah, all of whom were adversely affected by the illegal acts of the United States Air Force. (App., 2a-3a.) As a result of a recommendation of the 1993 Base Closure and Realignment Commission, the AFMC was directed to close the Newark Air Force Base (Newark AFB), and to redistribute to other AFMC facilities, the critically important workload of the Newark facility which had been performed by over eight hundred federal employees.[1] Four of the plaintiffs worked for the Newark AFB at the time

[1] At or about the time it implemented its illegal "Privatization in Place" actions regarding the workload at the Newark AFB, the AFMC announced plans to treat the workload of two other large AFMC facilities in the same illegal way as it had at the Newark AFB. Thus, the complaint in this matter, filed in March of 1996, references actions at all three AFMC facilities. Because of subsequent acts of Congress and subsequent actions by the AFMC, a different approach than that announced was ultimately implemented by the government at those two other facilities. In litigating this case at this stage, it is useful to focus on the events that actually occurred at the Newark AFB as representing the type of fully consummated illegality that is at issue.

that the complaint in this matter was filed. The other nine individual plaintiffs either worked for or had worked for one of the other AFMC depots. (App., 5a-7a.)

The general intent of the Base Realignment and Closure Commission was to save money by closing the Newark AFB and sending its workload to one or more of the surviving AFMC depots which had unused capacity. In addition, because the Newark workload was made up of "core logistics functions" as defined by 10 U.S.C. Section 2464, and thus had to be performed by federal employees for military readiness reasons, the Air Force should have permitted its surviving depots to compete pursuant to "merit based selection procedures" for the Newark workload as called for at 10 U.S.C. Section 2469(a)(1) and transferred that workload to one or several of those depots. Alternatively, the Secretary of Defense could have followed a detailed procedure spelled out in 10 U.S.C. Section 2464(b) in order to be permitted to hold a public private competition pursuant to OMB Circular A-76 between AFMC facilities and private contractors with regard to the performance of the Newark AFB workload. (App., 2a, 43a-44a.) That detailed procedure, which called for the issuance of appropriate regulations by the Secretary of Defense and transmittal of a reasoned decision pursuant to those regulations by the Secretary to the appropriate committees of Congress, was totally ignored. See 5 U.S.C. Section 2464(b)(2). (App., 43a-44a.) Instead of acting in conformity with these procurement statutes by sending the Newark AFB workload to one or more of the surviving depots, or holding a public private competition, the Air Force put that workload out for bid by private sector contractors only. (App., 2a-3a.) This prevented the other AFMC facilities from bidding on the Newark workload, which they were prepared to do, and prevented one

of those depots from winning that competition.[2] As a result, several of the plaintiffs who would have transferred to the new location for that workload under an agency Priority Placement Program were not able to do so, and these plaintiffs thus lost their government salary and benefits.

The winning private sector contractor began performing that workload as of October 1, 1996. Two of the plaintiffs in this action, who had worked at the closed Newark facility, were offered jobs by the winning private sector bidder at less salary and less benefits than they had earned as federal employees. (App., 5a-6a.) These plaintiffs would have transferred, pursuant to the agency's Priority Placement Program, which was set up to help displaced workers transfer in such situations, to any defense facility that would have received the specialized Newark workload had the Newark workload been transferred as required by law. Within a year or two these employees had been terminated by the private contractor. (App. 5a-6a.) At least two of the plaintiffs had worked at the Hill Air Force Base in Ogden, Utah, performing the type work done at Newark AFB, but had been laid off because of lack of work shortly prior to the time that the private sector contractor began performing the Newark workload. These individuals would have been entitled to re-employment rights at Hill AFB or at any other defense depot that would have received the Newark workload had that workload been properly transferred. (App., 6a.) The other individual plaintiffs all worked for the AFMC at the various depots that could have received the Newark

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[2] A General Accounting Office study has indicated that privatizing the Newark workload will end up costing the federal government far more than transferring the workload to one of the other AFMC depots. *Aerospace Guidance and Metrology Center [Newark AFB]*, GAO/NSIAD 95-60, December 1994, pp. 6-8.

workload, if it had been transferred there or sent there after a public private competition. The arrival of that workload at one or more of those surviving depots would have improved job stability for them because at all of the surviving depots significant layoffs were anticipated or had already been effectuated. (App., 7a.) In short, over eight hundred federal civilian positions with the AFMC ceased to exist as a result of the government's illegal actions in privatizing the Newark workload.

B. Proceedings Below

As a result of the defendants' illegal actions, the plaintiffs filed the complaint in the United States District Court for the Southern District of Ohio on March 18, 1999. The basis for jurisdicion in that court was 28 U.S.C. 1331. Several of the plaintiffs who worked at the Newark AFB at that time expected to, and eventually did, lose any opportunity to follow the Newark workload to another federal worksite where they would have continued to earn a federal salary and benefits. (App., 5a-6a.) They began to work for the private contractor who had won the Newark workload for less salary and benefits than they had been earning as federal employees. Two other plaintiffs, who performed the type of specialized work done at Newark, would have been rehired by the AFMC had the Newark workload been transferred to one of the surviving depots. The other plaintiffs, all of whom worked for the AFMC, saw the value of their seniority and their job stability suffer by the loss of these eight hundred jobs. (App., 5a-7a.) One of those individuals, in anticipation of a RIF at his facility resulting from the loss of these eight hundred jobs, resigned from his position to begin a new career. One very important component of the complaint which the Sixth Circuit totally ignored in its deci-

sion, was an allegation that had an OMB A-76 public private competition been held, one of the AFMC depots would definitely have won the competition. The District Court refers to it only indirectly. (App., 21a.)

The plaintiffs sought to take discovery.[3] That discovery included the proposed depositions of individuals who would have testified that it was known that the Hill AFB would have been the low bidder on the Newark workload in a fair public private competition. The government filed a motion for a protective order on May 17, 1996. The government filed a motion to dismiss on June 26, 1996. The plaintiffs filed a motion to have that motion denominated as a de facto motion for summary judgment and to be permitted to take necessary discovery. On April 8, 1997, the District Judge issued an order in which he refused to permit discovery, refused to convert the government's motion to a motion for summary judgment, and indicated that he would decide the motion to dismiss after the plaintiffs had had an opportunity to file an answer. (App., 35a-38a.) On March 18, 1998, the District Judge issued an order dismissing the complaint. (App., 13a-14a.) That opinion found that the plaintiffs lacked both constitutional standing, i.e., no injury in fact, and prudential standing. (App., 22a, 28a-29a.) In addition the court concluded that the matter was non-justiciable. (App., 32a.)

The plaintiff appealed to the United States Court of Appeals for the Sixth Circuit. That court issued an opinion on June 15, 1999, which concluded that "plaintiffs' claims do not satisfy the requirements for Article III standing." (App., 7a-11a.) It did not address the prudential standing and justiciability issues. (App., 12a.)

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[3] No administrative record pertaining to the agency's decision to privatize the Newark workload was ever filed with the court.

The plaintiffs' petition for rehearing en banc was denied on September 7, 1999. (App., 39a-40a.)

REASONS FOR GRANTING THE PETITION

This case merits the Court's review for two reasons: (1) the Sixth Circuit has decided an important federal question, i.e., what must be alleged or shown by an aggrieved plaintiff to establish constitutional standing sufficient to withstand a Rule 12(b)(1) motion to dismiss, in a way that directly conflicts with relevant decisions of this Court, and (2) the Sixth Circuit has entered a decision in conflict with a recent decision of the United States Court of Appeals for the Seventh Circuit on the same important matter.

I. The Court Below Required Actual Proof of the Elements of Article III Standing at the Pleading Stage, and in So Doing It Violated This Court's Directives in *Lujan*.

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), has become one of the primary decisions of this Court in defining what criteria are to be used by the federal courts in deciding whether a plaintiff has established Article III standing. That decision requires a different showing from the plaintiff regarding Article III standing depending upon the stage of the litigation. At the pleading stage "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that the general allegations embrace those specific facts that are necessary to support the claim.' " *Id.* at 561. At the summary judgment stage the court is directed to consider the averments made in support of the motion for summary judgment and supporting affidavits or other evidence to see if the appropriate evidentiary burden has

been met,[4] and likewise at the trial stage the evidence adduced must fully meet the appropriate evidentiary burden.

In the instant case the Sixth Circuit used the higher evidentiary standard, which is reserved for the summary judgment and trial stages of a proceeding, in deciding to affirm the granting of the motion to dismiss by the District Court. *AFGE v. Clinton*, 180 F.3d 727, 731 (6th Cir. 1999) ("If the injuries at issue are the loss or possible loss of jobs, *it is difficult to show* that those injuries *are 'caused'* by the failure to follow prescribed procedures or that they *would be redressable* by the relief the plaintiffs seek." (Emphasis added) (App., 7a-8a). In so doing the Sixth Circuit decided an important federal question regarding Article III standing in a way that conflicts not only with *Lujan* but with numerous other subsequent decisions of the Court that have explicitly adopted the *Lujan* approach. See for example *Bennett v. Spear*, 520 U.S. 154, 167 (1997); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. at 83 ——, 118 S. Ct. 1003, 1017 (1998).[5]

If the current decision stands, it will serve both in the Sixth Circuit and beyond for the incorrect proposition

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[4] See Rule 56(c) and (e) of the Federal Rules of Civil Procedure. *Lujan* itself was decided at the summary judgment stage.

[5] The Circuit Court did not rule on either the prudential standing, i.e. zone of interest, or justiciability issues which had been decided against the plaintiffs in the district court. Because the Newark workload was all "core logistics functions", 10 U.S.C. Section 2464, Congress had expressed a preference that it be performed for military readiness reasons by federal employees like the plaintiffs. Given the "core" nature of that workload, precedent suggests that both prudential standing and justiciability requirements were met. *AFGE v. Cohen*, 171 F.3d 460, 475 (7th Cir. 1999). These two standing issues are not discussed in this petition because they were not ruled on by the Circuit Court. They were fully briefed and argued before the Circuit Court.

that *Lujan* permits the granting of a motion to dismiss because of lack of supporting evidence of record before any discovery has been obtained or before any administrative record has been filed with the court in an APA action, even if the allegations of the complaint fully set forth all of the prerequisites for Article III standing. While improperly demanding an evidentiary showing of causation and redressability, the Sixth Circuit also ignored the fact that the injury suffered here by the plaintiffs was the basic denial to them of the *opportunity to compete* for continuing federal employment, salary and benefits through the various surviving AFMC installations in a public private competition pursuant to OMB Circular A-76.[6]

The alleged failure to be afforded an opportunity to compete [7] through these installations for the Newark workload and their jobs, salary and benefits constitutes an alle-

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[6] The Office of Management and the Budget Circular A-76, OMB Circular A-76, is the dominant set of guidelines used to evaluate whether public or private performance of a federal government workload would be the most efficient. A detailed history and explanation of that issuance may be found in *Diebold v. United States*, 947 F.2d 787, 789-794, 800-801 (6th Cir. 1991), *petition for rehearing denied*, 961 F.2d 97 (6th Cir. 1992). ("We therefore hold that the contracting-out decision in this wrongful privatization case is reviewable in a federal district court under the APA.") *Id.* at 811.

[7] This Court has held that the illegal deprivation of such an opportunity to compete for a contract can constitute sufficient injury to meet Article III standing requirements. *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663-666 (1993). The complaint here alleged both the illegal deprivation of the ability to compete and, although it was not necessary to either allege or prove it to have stated on Article III injury, that had a fair public private competition been held, one of the surviving AFMC depots would have won the Newark workload and at least plaintiffs Sheffer and Dearing would not have ceased working for the Department of Defense.

gation of serious economic harm equivalent in significance in every way to the types of aggrievement or injuries alleged and found cognizable at the pleading stage by this Court under the APA, 5 U.S.C. Section 702. (App., 42a.) See *Bennett v. Spear*, 520 U.S. 154, 168 (1997) ("Given petitioners' allegation that the amount of available water *will be* reduced and that they *will be* adversely affected thereby, it is *easy to presume* specific facts under which petitioners *will be injured*—for example, the Bureau's distribution of the reduction pro rata among its customers.") (emphasis added.) Note also in *Lujan* at 573, fn.8: ("We do not hold that an individual cannot enforce procedural rights; he assuredly can so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.") While limiting the federal courts to true "cases" and "controversies" comports with Article III of the Constitution, the premature dismissal of potentially meritorious actions because of an unreasonable demand for proof of injury, causation and redressability at the pleading stage, as was done here, does not serve this end and does not comport with the decisions of this Court.[8] It appears that the Sixth Circuit mistakenly thought in the instant case that because the causal connection between the illegal acts and the injury was somewhat complex or multi-stepped, proof of this connection at the *pleading stage* was required to survive the

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[8] In *Bennett v. Spear, supra*, Justice Scalia carefully made numerous presumptions in order, at the pleading stage of the proceeding there, to find that injury in fact might occur to a downstream rancher concerned about the ultimate effects of possibly less water resulting at some point in the future from the newly issued advisory Biological Opinion of the Fish and Wildlife Service that was the administrative action being challenged. That same presumptive approach to the allegations in the complaint at the pleading stage, as called for in *Lujan*, should have been used by the Sixth Circuit in the instant case, but it clearly was not.

motion to dismiss. *Bennett v. Spear, supra,* with Justice Scalia writing for a unanimous court holds emphatically to the contrary.

The granting of the instant petition will permit the Court to review and clarify what has become a very confusing and litigation inducing area of law.[9] It is generally acknowledged that *Lujan* represents a seminal, often cited, and less than clear precedent. See, for example, Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 165 (1992) ("*Lujan* may well be one of the most important standing cases since World War II."), and at 167 ("More fundamentally, the very notion of 'injury in fact' is not merely a misinterpretation of the Administrative Procedure Act and Article III but also a large-scale conceptual mistake."); Nichols, *Justice Scalia, Standing, and Public Litigation*, 42 Duke L.J. 1141, 1142-1143 (1993), ("This ruling, in my view, will mark a transformation in the law of standing—the law of 'judicial control of public officers'. . . . The decision is difficult to square with the language and history of Article III, with the injury requirement itself, with more modest visions of judicial power, and with time-honored notions of public law litigation."); Pierce, *Comment: Lujan v. Defenders of Wildlife: Standing As A Judicially Imposed Limit on Legisla-*

[9] When Article III, Section 2 of the U.S. Constitution states that the judicial power shall extend to all controversies to which the U.S. shall be a party and Congress has passed the APA, giving judicial review to persons aggrieved by illegal agency action, 5 U.S.C. Section 702, how can the courts find no standing when eight hundred federal jobs have disappeared as a result of the illegal actions of a federal agency and the plaintiffs had a clear entitlement to some of those jobs or at least to an opportunity to compete for some of those jobs? Congress explicitly recognized the direct interest of federal employees, like the plaintiffs here, in these types of workload competitions. See 10 U.S.C. Section 2467(b). (App., 48a-50a)

tive Power, 42 Duke L.J. 1170, 1170-1171 (1993), ("The first [point] is that Justice Scalia's opinion in *Defenders* is an insupportable judicial contraction of the legislative power to make judicially enforceable policy decisions.").

More recently the imprecise nature of the doctrine of *Lujan* [10] regarding constitutional standing was revealed in *Federal Election Comm'n v. Atkins*, 524 U.S. 11 (1998), where Justice Breyer, writing for six members of the Court and citing *Lujan* as support, *id.* at 23-24, found that constitutional standing had been established, while Justice Scalia, the author of the seminal opinion in *Lujan*, writing for the three dissenting Justices found to the contrary. See Sunstein, *Informational Regulation and Informational Standing: Atkins and Beyond*, 147 U. Pa. L. Rev. 613, 616 (January 1999) ("The Supreme Court's decision in *Atkins* is the vehicle for much of the analysis, because the *Atkins* Court covers a strikingly wide range of standing issues, in a way that is full of implications for the future."). Granting the instant petition for certiorari will permit the Court to issue a decision that will better establish order in what has become a conceptually disorderly area of law.

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[10] It is worth noting that Justice Scalia's opinion, which is much cited, was joined in fully by only four Justices. The two additional concurring Justices, Justices Kennedy and Souter, who joined in most but not all of the reasoning of Justice Scalia's opinion, would apparently have found that the requirements for constitutional standing would have been met had the wildlife researchers in that case simply purchased an airline ticket to travel on a date certain to the sites in Egypt and Sri Lanka where the damage to endangered species habitat was possibly going to occur. *Lujan v. Defenders of Wildlife*, 504 U.S. at 579-581.

II. The Court Below Required Proof of the Elements of Article III Standing at the Pleading Stage in a Manner That Directly Conflicts With a Recent Decision of Another Circuit Which Was Effectively Ruling on the Same Set of Facts, and This Inconsistency in the Circuits Will Give Rise to More Appeals From the Granting of Rule 12(b)(1) Motions.

This petition should also be granted because the Sixth Circuit's decision here is in direct conflict with a recent decision of the Seventh Circuit on an important federal matter, i.e., the standard courts are to use in ruling on a motion to dismiss based on an asserted lack of Article III standing. See *American Federation of Government Employees v. Cohen*, 171 F.3d 460, 465-468 (7th Cir. 1999). In both cases the United States Department of Defense violated a procurement statute [11] by not holding a public private competition regarding a particular workload and thus significantly reduced the plaintiffs' chances of continuing to earn a salary and benefits with that department. The Seventh Circuit concluded that the plaintiffs had sufficiently established constitutional standing to survive a motion to dismiss, and the matter was remanded for further proceedings. In the instant case the Sixth Circuit ruled that the plaintiffs had not sufficiently established constitutional standing to withstand a motion to dismiss, and they affirmed the dismissal of the action by the District Court. *American Federation of Government Employees v. Clinton*, 180 F.3d 727, 731-732 (6th Cir. 1999) (App., 7a-11a). Both courts were reviewing the granting of a F.R.C.P. Rule 12(b)(1) motion. Although

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[11] In the Seventh Circuit case the statute was 10 U.S.C. Section 4532, which requires a public private competition for Arsenal Act workload before any outsourcing. In the Sixth Circuit case the statute was 10 U.S.C. Section 2464, which requires a public private competition pursuant to OMB Circular A-76 before any outsourcing of core logistics functions.

the facts were the same in all relevant aspects, the two courts understood the holding on Constitutional standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-562 (1992), in directly conflicting manners.[12] Such a conflict in Circuit Court opinions is likely to give rise to uneven results throughout the federal court system in the future and to generate unnecessarily protracted litigation on Article III standing issues as more outsourcing of work is pursued in the federal sector. In addition it appears that *Lujan*'s not entirely clear proscription regarding the proper evaluation of a showing of constitutional standing at the pleading stage is widely used by the lower courts. It should be made absolutely clear for the benefit of both courts and litigants.

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[12] In both cases a legally mandated public private competition was not held. In the current case the plaintiffs had also lost an opportunity for continued federal employment or reemployment by having the Newark workload transferred to some other AFMC or Defense Department facility. Such a transfer was mandated by Congress for the "core logistics functions" workload performed at Newark, unless the Secretary of Defense complied with a waiver provision which he did not do. 10 U.S.C. Section 2464 (1996) (App., 43a-44a) That statute was amended in 1997 after this action had been filed. The amended statute is not different in any way that is of significance here. (App., 45a-47a)

Had the waiver provision been complied with, an OMB Cir. A-76 public private competition would have been held pursuant to 5 U.S.C. Section 2464(b)(2). (App., 43a-44a, 46a-47a) In the instant case the Sixth Circuit's attempt to distinguish the instant case from the case decided by the Seventh Circuit does little more than to suggest that the causal connection between the illegal act and the injury in the instant case was somewhat more complex than it was in the Seventh Circuit case. (App., 10a-11a) At the pleading stage this difference should have had no relevance. In both cases the plaintiffs alleged that Defense Department facilities would have won the public private competition and that their federal jobs, salary and benefits, whether where they presently worked as in the Seventh Circuit case, or where they had a right to transfer to work under the Defense Department's Priority Placement Program as in the Sixth Circuit case, would not have been privatized.

The Seventh Circuit properly recognized that in responding to a motion to dismiss based on a claim of lack of constitutional standing, there was no requirement that the plaintiffs prove that the alleged illegal acts of defendants caused the plaintiffs to experience a specific injury in order to defeat the motion. See *American Federation of Government Employees v. Cohen*, 171 F.3d at 467. ("Again, *assuming* the allegations above are true, Rock Island [arsenal] *stands a good chance* of gaining some of this work. . . . *If that happens*, the RIF [reduction in force] and its impact *may be avoided*. We recognize that this is only a probability, *but probabilities are enough* to satisfy Article III's requirements. *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991))." (Posner, J.) (emphasis added).[13] In contrast, in the instant case the Sixth Circuit improperly required that plaintiffs "*show that these injuries are caused*" by the prescribed procedures or *that they would be redressable* by the relief the plaintiffs seek." *Id.* at 731 (App., 7a) (emphasis added). The Sixth Circuit's affirmance of the granting of the motion to dismiss was based on a misunderstanding of what kind of showing *Lujan* requires at the pleading stage and is directly at odds with the Seventh Circuit's refusal to affirm a motion to dismiss at the pleading stage on what is effectively the same set of facts.[14]

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[13] The Seventh Circuit seemed convinced that the loss of the opportunity by Rock Island Arsenal to compete pursuant to OMB Circular A-76 for the workload there at issue, by itself and without reference to who would ultimately win that competition, represented, at least at the pleading stage, a cognizable Article III injury to the plaintiffs.

[14] It is true that the Seventh Circuit had before it at least two powerful pieces of evidence in support of the plaintiffs' allegations, i.e., a written opinion by the General Counsel of the Army stating that one of the workloads in question would have all been kept at

While in this case the governmental regulation that did not occur was, *inter alia*, requiring the AFMC to hold a public private competition before privatizing the Newark workload, and this failure to regulate as called for by Congress eventually harmed the plaintiffs, proof connecting their injuries to the illegal conduct could have been demanded at the summary judgment or trial stage of the proceedings, but it should not have been required at the pleading stage. Justice Scalia's summary of the relevant law in *Lujan, id.* at 561-562, indicated that:

> "[w]hen the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. . . . When however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, more is needed. . . . and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or

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Rock Island if the law had been followed and evidence that Rock Island Arsenal tried unsuccessfully to submit a cloaked public bid on the workload during the private contractor only bidding. However, the possession of such incriminating evidence in the hands of plaintiffs cannot be considered a requirement to pass Article III muster at the pleading stage, and to its credit the Seventh Circuit did not write its opinion in a way that gave credence to that evidence as being established fact. *AFGE v. Cohen*, 171 F.3d at 463-464, 466-467. In the instant matter there was no administrative record filed by the government and discovery was not permitted by the trial court. (App., 35a-38a) It is unreasonable to expect plaintiffs in such a situation to be able to offer, as a general rule, such self-incriminating documents or testimony at the pleading stage.

> will be made in such manner as to produce causation and permit redressability."

When Justice Scalia stated "more is needed" in the above passage he was talking about proof being offered at the summary judgment or trial stage of the proceeding, not at the pleading stage.[15] In the instant case the Sixth Circuit incongruously repeats Justice Scalia's comment that "more is needed" even though the instant case was decided at the pleading stage. *AFGE v. Clinton*, 189 F.3d at 731. ("Numerous acts and facts may injure employment 'prospects' in some unknowable and speculative fashion, but *something more is needed* to establish standing to sue.") (emphasis added).

Thus there was no need, as understood by the Seventh Circuit in *AFGE v. Cohen*, pursuant to *Lujan*, for the plaintiffs in this matter, which concerned a decision at the pleading stage, to proffer evidence in support of their "injury" allegations. Nevertheless it is precisely because plaintiffs did not make such a showing that the Sixth Circuit affirmed the granting of the motion to dismiss. ("If the injuries at issue are the loss or possible loss of jobs, it is difficult to show that those injuries are 'caused' by the failure to follow prescribed procedures or that they would be redressable by the relief the plaintiffs seek.") *Id.* at 731 (App., 7a) (emphasis added). Under the proof matrix set up in *Lujan* the plaintiffs should not have been required "to show" how their injuries were caused by the defendants' actions.

Additionally, the Sixth Circuit here improperly required from plaintiffs a degree of proof of the causation and redressability of the injury suffered by plaintiffs that was not required by this court in *Lujan* and was not required on a

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[15] It should be noted that *Lujan* was decided at the summary judgment stage. *Lujan v. Defenders of Wildlife*, 504 U.S. 554, 559 (1992).

very similar set of facts by the Seventh Circuit just three months before the Sixth Circuit issued its opinion.[16] Whereas the Sixth Circuit required an evidentiary showing at the pleading stage, the Seventh Circuit took a dramatically different and presumption oriented approach on the issues of causation and redressability in stating:

> "Thus *assuming as we must* at this stage that these allegations are true, *had the statutory cost comparisons been performed* before allowing General Dynamics to retain its share of the M1A2 work, and before Rock Island was kept from participating in the VIPER bidding, Rock Island *would likely* have maintained sufficient work load to avoid the RIF [reduction in force or layoff] entirely, or *at least reduce its severity*."

AFGE v. Cohen, supra, at 466 (emphasis added).

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[16] The primary distinction between the alleged suffered loss of jobs and job opportunities in the instant case and the allegations of lost jobs and job opportunities in the Seventh Circuit case, is that in the instant case the lost jobs and job opportunities were alleged to be located at one or more of some unnamed DOD facilities that would have either received the Newark workload through transfer or received that workload through their success in an A-76 public private competition, while in the Seventh Circuit case the lost jobs and job opportunities were all alleged to be at the Rock Island Arsenal. It is respectfully submitted that while this distinction perhaps makes it slightly more complicated to geographically locate the eight hundred lost federal DOD jobs in this case, than it was to locate the jobs at the Rock Island arsenal in the Seventh Circuit case, those lost jobs were, per the allegations in the two cases, just as tangibly extant, real, concrete and unavailable to the plaintiffs here as were the jobs in the Rock Island case. These allegations should have been accepted as true at the pleading stage of the proceedings but were not. Although it should not have been necessary to defeat the motion to dismiss since this was at the pleading stage, plaintiffs had submitted material to the trial court in support of their motions for preliminary relief which suggested that the Hill Air Force Base in Ogden, Utah, would have been the recipient of the Newark workload whether it was transferred or whether an A-76 competition was held.

The conflict in the way the Sixth Circuit and the Seventh Circuit have applied the evidentiary matrix in *Lujan* leaves an important area of the law of Article III standing in a confused state. The Sixth Circuit case invites trial courts to prematurely dismiss well plead cases and could also influence other circuit courts to adopt its misguided reading of *Lujan*. Thus a ruling by the Court on the conflict presented here by the Sixth Circuit and Seventh Circuit would clarify for the entire federal judiciary how the constitutional standing ruling in *Lujan* should be used at the pleading stage. Such increased clarity should result in less appeals to the circuit courts and to this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1999

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 98-3385

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; JIM DAVIS; SCOTT BLANCH; DAVID C. SHEFFER; JESSE R. SALCEDO; DARRELL WILLIAMS; MICHAEL D. DEARING; GEORGE H. WHITE; HILL/DDO/95 INC.; GEORGE CARRIKER; HARRY BURNETTE; DANIEL SOSA; LOUIS H. HARWELL, JR.; CONNIE K. SCARBOROUGH; LUANNE LEWIS,

Plaintiffs-Appellants,

v.

WILLIAM J. CLINTON,
President of the United States, *et al.*,
Defendants-Appellees.

Argued March 11, 1999
Decided June 15, 1999

Before: SILER, DAUGHTREY, and GILMAN, Circuit Judges.

OPINION

SILER, Circuit Judge.

The plaintiffs appeal the dismissal of their claims for lack of standing and non-justiciability. For the reasons given below, we AFFIRM.

BACKGROUND

The plaintiffs are current and former civilian employees of Air Force depots; the American Federation of Government Employees ("AFGE"), an international union that represents about 700,000 federal government employees; and Hill/DDO/95 Incorporated ("Hill"), a non-profit organization interested in the economic development of the Hill Air Force Base. The plaintiffs challenge the decision to put the workloads of the Newark Air Force Base, the McClellan Air Force Base, and the Kelly Air Force Base out for bid by private contractors only, following earlier decisions to close the bases under the Defense Base Closure and Realignment Act of 1990, 10 U.S.C. § 2687 (1994). The plaintiffs assert their claims for declaratory and injunctive relief under the Administrative Procedures Act ("APA"), 5 U.S.C. § 702.

The plaintiffs argue that the workload performed at Newark, Kelly, and McClellan Air Force Bases was designated as "core logistics" work. For national security reasons, core work must be done only by federal employees who report directly to the military. *See* 10 U.S.C. § 2464(b)(1). The Secretary of Defense designates which functions are "core." *See* 10 U.S.C. § 2464(a). The Secretary may waive the core designation. *See* 10 U.S.C. § 2464(b)(2). Under 10 U.S.C. § 2464(b)(2), plaintiffs argue, if the Secretary does waive the core designation of a workload, the workload can only be considered for conversion to private performance in accordance with OMB Circular A-76, which requires competition between public and private bidders. The plaintiffs argue that the

Secretry did not waive the core designation at the three bases and that only private contractors were allowed to bid on the transferred workload. They assert that this conduct thus is a violation both of the statute and of Circular A-76, which would only apply if the Secretary waived the core designation.

The plaintiffs also cite 10 U.S.C. § 2469 for the proposition that the depot-level maintenance or repair workload, whether consisting of core or non-core logistics functions, can only be transferred to a contractor or another depot through the use of (1) "merit-based selection procedures for competitions among all depot-level activities of the Department of Defense ['DoD']; or (2) competitive procedures for competitions among private and public sector entities."[1] The plaintiffs argue that under 10 U.S.C. § 2470, a depot-level activity of the DoD is entitled to compete for the performance of any depot-level maintenance and repair workload of a Federal agency for which competitive procedures are used.

The defendants moved to dismiss, based in part on the plaintiffs' lack of standing. The district court granted defendants' motion, and denied motions by the plaintiffs for a preliminary injunction and temporary restraining order. It held that the plaintiffs had not shown "injury in fact," and thus lacked Article III standing; that they lacked prudential standing; and that §§ 2464, 2469, and 2470 implicated nonjusticiable political questions and therefore were not subject to judicial review.

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[1] Section 2469(c) states that OMB Circular A-76 does *not* apply; this seems to contradict § 2464(b)(2). The two provisions are reconcilable, however, by reading § 2464(b)(2) to make Circular A-76 applicable only where the Secretary has explicitly waived core workload designation. Otherwise, reassigned core workload is to be competed under § 2469(a)(1), and non-core workload under § 2469(a)(2).

DISCUSSION

Article III Standing—Individual Plaintiffs

For purposes of ruling on a motion to dismiss for lack of standing, a complaint must be viewed in the light most favorable to the plaintiff; all material allegations of the complaint must be accepted as true. *See Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Plaintiffs, however, bear the burden of persuading the court that it has subject matter jurisdiction. *See Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 915 (6th Cir.1986). A party's standing is a question of law reviewed *de novo*. *See Greater Cincinnati Coalition for the Homeless v. City of Cincinnati*, 56 F.3d 710, 715 (6th Cir.1995).

To establish Article III standing to sue in federal court, an individual plaintiff must show that (1) he or she has suffered an "injury in fact"; (2) there is a causal connection between the injury and the conduct complained of; and (3) the injury will likely be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

The district court correctly read *Dalton v. Specter*, 511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994), as foreclosing review of the decision to close the three bases. The closures were the result of the 1993 and 1995 Base Realignment and Closure Commission Reports, themselves made pursuant to and in accordance with the Defense Base Closure and Realignment Act of 1990. The Supreme Court held that "[w]here a statute, such as the 1990 Act, commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available." *Dalton*, 511 U.S. at 477, 114 S.Ct. 1719.

The plaintiffs do not challenge the closures, however, but instead challenge the procedures by which base workloads were assigned to private contractors. Basically, they assert that the workloads should have been assigned to other military bases as "core logistics work" pursuant to 10 U.S.C. § 2464(b)(1), or that if the Secretary of Defense had exercised his discretion and waived the core designation, public and private bidders should have competed for the workloads in accordance with OMB Circular A-76. They argue that the failure to transfer the workload to other military bases, or at least to give those bases the opportunity to compete for the workload, injured their employment or employment prospects in various ways.

However, a plaintiff's injury must be "concrete and particularized." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. The alleged injury must be "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* at 560, 112 S.Ct. 2130. A critical question in this case is whether the plaintiffs' injuries are sufficiently concrete and particularized, or sufficiently actual and imminent, to establish injury in fact. Some attention must therefore be given to the injuries asserted in the complaint.

One group of plaintiffs includes former employees at Newark, either working for Rockwell, the private contractor who assumed the Newark workload, or not working at all. Those plaintiffs still employed argue that their jobs with the private contractor pay lower salaries and have less generous benefits than their federal employment. A sample of the argument follows: "If other federal installations had been permitted to bid on the Newark AFB workload one of those installations would have won the bid and Mr. Sheffer would have been able to remain a federal employee by moving to the winning

installation through the agency's Priority Placement Program, (PPP)." Plaintiffs Sheffer and Dearing, initially hired by Rockwell, were terminated after the complaint was filed. The plaintiffs also assert that eighty-five of the former Newark employees hired by Rockwell were later terminated.

Two other plaintiffs, Scarborough and Lewis, formerly worked at Hill AFB and lost their jobs in a reduction in force. They argue that if proper procedures had been followed, they would have had a greater chance of remaining employed. A sample of this argument follows:

> [Scarborough] was removed from her job through a Reduction in Force action as the result of a lack of calibration related workload. Her skills and the skills of her group were such that the calibration work of the Newark AFB could have been done by them at a very lower bidding [*sic*] by the defendants herein did not permit Hill AFB and/or her work group to bid on that work and as a result she lost her federal job. When any of the core work at NAFB, MAFB and/or KAFB is performed by non-federal employees, Ms. Scarborough's federal career prospects were and are hurt. Likewise when any federal work at the aforesaaid bases is put out for bid in a competition that bars federal installations from the bidding, her federal career prospects were and [*sic*] hurt. Thus for example if the work at KAFB were bid on and won by e.g. Hill AFB, Ms.. Scarborough would have the option of possibly working again at Hill AFB. If the work was bid on and won by Hill AFB, this would improve Ms. Scarborough's chances of remaining employed or being employed at Hill AFB. The defendants' illegal actions thus directly harm her and her family.

Three plaintiffs presently work at Kelly and McClellan Air Force Bases, also stated for closing. These plaintiffs argue that if the proper procedures were followed, they would have a greater chance of remaining employed by the federal government.

Another three plaintiffs presently work at Warner Robins Air Force Base. Another plaintiff "expects to be rehired to his old job" at Hill Air Force Base in the near future. These plaintiffs argue that "employees working or who formerly worked on the above referenced workload at NAFB, MAFB and/or KAFB . . . in the event of a reduction in force . . . because of lack of work and/or the inability of Warner Robins [or Hill] to bid on the NAFB, MCAFB and KAFB workload, would be able to compete for and displace" the plaintiffs from their jobs.

One plaintiff, presently working at Tinker Air Force Base, asserts more generally that his federal career prospects are hurt by the defendants' action. He argues that if work at the closing bases were bid on and won either by Tinker Air Force Base, or by another base where he might have an opportunity to work, he would have greater opportunities either for career advancement or simply for remaining employed.

We find the asserted injuries too speclative, and insufficiently concrete and particulaized to establish Article III standing. If the injuries at issue are the loss or possible loss of jobs, it is difficult to show that those injuries are "caused" by the failure to follow prescribed procedures, or that they would be redressable by the relief the plaintiffs seek. The Secretary has the discretion to waive the core designation. Other bases might choose not to bid, or might not win a bidding competition. Even if those bases did acquire the workload of the closed bases, the plaintiffs might not obtain employment there.

If the injury at issue is simply harm to the plaintiffs' employment prospects, that injury is insufficiently concrete and particularized to establish Article III standing. Numerous acts and facts may injure employment "prospects" in some unknowable and speculative fashion, but something more is needed to establish standing to sue.

The scenario here is similar to that of *National Maritime Union of America, AFL-CIO v. Commander, Military Sealift Command,* 824 F.2d 1228 (D.C.Cir.1987). In *National Maritime,* unions representing employees of unsuccessful bidders for government contracts challenged the contract award, alleging that the failure to include a specific wage and benefit determination from the Labor Secretary violated the Service Contract Act. *See id.* at 1235. While the District of Columbia Circuit found that the loss of present or future jobs as a result of the contract award might constitute a "distinct and palpable" injury (in a way that mere harm to employment "prospects" alleged by some of the plaintiffs here does not), that injury was "neither fairly traceable to the putatively illegal omission of a wage determination from the contract nor fairly redressaable by the remedy the Unons seek." *Id.* Nothing suggested that the winning bidder would not have won the contract anyway, that the losing bidder would have participated in a rebidding, or that the government's internal cost analysis would have changed. These facts, along with the "uncertainty about the effect of the private bidders' assumed wage and benefit levels on the bids in the second round of bidding[,]" all pointed "to a single conclusion that the injury to the Unions' members is causally speculative." *Id.* at 1236. Here, the fact that the Secretary can simply waive the core designation, and the inability to show a likelihood that the plaintiffs would acquire different or better jobs if mandated procedures were followed,

make the injuries to these plaintiffs causally speculative as well.

A case in which the District of Columbia Circuit did find standing for a group of union employees is distinguishable from our facts. In *International Union of Bricklayers and Allied Craftsmen v. Meese,* 761 F.2d 798 (D.C.Cir. 1985), unions challenged Immigration and Naturalization Services ("INS") guidelines for determining when aliens might enter the United States to perform work. The plaintiffs charged that the State Department and INS had violated statutory procedures in issuing work visas to aliens when the plaintiffs and other union members were "ready, willing and able" to perform work on a sawmill. *Id.* at 800. The court noted that if the plaintiffs were victorious, "relief from the foreign competition engendered (or at least tolerated) by the challenged governmental action will not be conjectural, but immediate. That kind of competition will be stopped." *Id.* at 803. The facts here, on the other hand, suggest conjectural rather than "immediate" relief. If the Secretary of Defense were forbidden to allow private contractor bidding on core logistic work, he could simply waive the core designation. It is also conjectural whether the plaintiffs would acquire better jobs, or any jobs at all, following a judicial order that particular ongoing depots be allowed to bid on work of closed depots. The facts here are much more like those of *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 96 S.t. 1917, 48 L.Ed.2d 450 (1976), cited by way of contrast in *Bricklayers,* 761 F.2d at 803. The Court found in *Simon* that the relief sought by the plaintiffs (withdrawal of a hospital's tax exemption) was not traceable to the alleged injury (denial of hospital care to indigent pationts), since hospitals might restrict such care even if the exemption were removed. *Simon,* 426 U.S. at 42-43, 96 S.Ct. 1917.

Traceability and redressability also distinguish this case from *American Federation of Government Employees v. Cohen*, 171 F.3d 460 (7th Cir.1999). The plaintiffs in *Cohen* challenged the Army's failure to comply with procurement and contracting statutes in awarding two defense projects to private contractors. *Cohen*, 171 F.3d at 463. The plaintiffs in *Cohen* were all employees of one arsenal, and maintaained that if the Army had complied with the statutes, "the projects *would* have been performed at their government facility, thereby preserving federal job opportunities." *Id.* (emphasis added). In finding that the plaintiffs had met the requirements for Article III standing, the Seventh Circuit found that they had alleged an actual loss of job benefits as the result of a reduction in force ("RIF"), that they could reasonably trace this loss to the Army's procurement and contracting procedures, and that the alleged injury would be readdressed by a favorable decision. More specifically, the court noted allegations and evidence that "lack of workload" was the only reason for the RIF, and that under proper analysis and procedures all the tank gun mounts would have been produced at the plaintiffs' arsenal. *See id.* at 466.

The plaintiffs here cannot make this clear showing. Their injuries tend to involve a potential loss of job benefits, not an actual one. Nor is any loss of benefits clearly traceable to a RIF which resulted (under the *Cohen* plaintiffs' allegations) solely from the failure to follow mandatory procedures. Here, on the contrary, any benefit loss results most clearly from the unchallengeable and unchallenged decision to close bases. Moreover, the plaintiffs here cannot show a *likelihood*, as opposed to a mere possibility, that a favorable decision of the court would redress their injury. *See Cohen*, 171 F.3d at 466 (citing *Steel Co. v. Citizens for a Better Environment,*

523 U.S. 33, ——, 118 S.Ct. 1003, 1016, 140 L.Ed.2d 210 (1998) ("plaintiffs must show that it is likely, rather than merely possible, that a favorable decision by the court would redress the injury")).

Article III Standing—AFGE

AFGE brought suit in its representational capacity. "An organizational plaintiff . . . may have standing to sue on its own behalf 'to vindicate whatever rights and immunities the association itself may enjoy' or, under proper conditions, to sue on behalf of its members asserting the members' individual rights." *Common Cause v. FEC*, 108 F.3d 413, 417 (D.C.Cir.1997) (quoting *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). AFGE must show that (1) at least one of its members has standing to sue in his or her own right; (2) the interests the suit seeks to vindicate are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the uawsuit. *See UAW v. Brock*, 477 U.S. 274, 282, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986).

Because none of the individual employees has established standing to sue, AFGE lacks standing also.

Hill/DDO/95 Inc.

Hill/DDO/95 Inc. is a non-profit corporation incorporated in Utah. "Its mission is to encourage the economic development of the Hill Air Force Base and its surrounding community." Hill argues that because Hill AFB was not allowed to bid on workload of the closing bases, the community in Utah was harmed, since Hill AFB might have been able to obtain the workload. "As a result many jobs were lost by the State of Utah."

In light of the previously discussed case law, Hill's claims are also speculative and cojectural, and Hill also lacks standing to sue.[2]

Prudential Standing/Justiciability

Because we find that the plaintiffs' claims do not satisfy the requirements for Arrticle III standing, it is unnecessary to address the prudential standing and justiciability issues.

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[2] Hill also would have problems establishing prudential standing, since its claims clearly involve " 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (quoting *Warth*, 422 U.S. at 499-500, 95 S.Ct. 2197).

[Filed Mar. 18, 1998]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-96-283
JUDGE SMITH

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, *et al.*,

Plaintffs,

-v-

WILLIAM J. CLINTON,
as President of the United States, *et al.*,

Defendants.

OPINION AND ORDER

This case stems from the decision to close the Newark Air Force Base, the McClellan Air Force Base, and the Kelly Air Force Base under the Defense Closure and Realignment Act of 1990, 104 Stat. 1808, reprinted in 10 U.S.C. § 2687 (1994). Plaintiffs—a federal employees' union, a non-profit community development group, as well as individual federal employees—challenge the conversion of workloads from these three military bases to private contractors. Plaintiffs assert their claims under the Administrative Procedures Act ("APA"), 5 U.S.C. § 702. They seek declaratory and injunctive relief.

Defendants move to dismiss (Doc. 15). Plaintiffs move for a preliminary injunction (Doc. 33) and for a tempo-

rary restraining order (Doc. 55). The Court heard oral argument on these motions on August 6, 1997. For the following reasons the Court GRANTS defendants' motion to dismiss. Consequently, the Court DENIES plaintiffs' motion for a preliminary injunction and motion for a temporary restraining order.

I.

The Court derives the following facts from plaintiffs' complaint. Plaintiffs are current and former civilian employees of Air Force depots, the American Federation of Government Employees ("AFGE"), and Hill/DDO/95 Incorporated ("Hill"). The AFGE is an international union that represents about 700,000 federal government employees throughout the country, including employees at Newark Air Force Base, McClellan Air Force Base, and Kelly Air Force Base. Hill is a non-profit organization interested in the economic development of the Hill Air Force Base.

Defendants are the Department of Defense ("DoD"), Mr. William J. Perry, who is Secretary of Defense, Mr. John P. White, who is Deputy Secretary of Defense, Mr. William J. Clinton, who is President of the United States, the Department of the Air Force, the Department of Air Force Material Command ("AFMC"), the Newark Air Force Base, the McClellan Air Force Base, the Kelly Air Force Base, and the Tinker Air Force Base.

Pursuant to the Defense Base Closure and Realignment Act of 1990, the Newark Air Force Base, the McClellan Air Force Base, and the Kelly Air Force Base were slated for closure. According to the July 1993 Defense Base Closure and Realignment Commission Report, the Newark depot workload was to be moved to other depot maintenance depots including the private sector. During

1995 defendants put the workload at the Newark depot out for bid by private contractors, and that workload was awarded to private contractors on or about December 18, 1995.

In July of 1995 the Defense Base Closure and Realignment Commission issued another report. According to the report, the workloads at the Kelly and McClellan depots were to be consolidated and moved to other DoD depots or to private sector commercial activities as determined by the Defense Depot Maintenance Council. After the 1995 report, defendants issued statements that they planned to bid the workloads from the Kelly and McClellan depots to private contractors.

A. Statutory Framework

The workload performed at Newark, Kelly and McClellan Air Force Bases were designated as "core logistic" work. For national security reasons, core work must, by statute, be done only by federal employees who report directly to the military. *See* 10 U.S.C. § 2464(b)(1). The Secretary of Defense designates which functions are "core" and which are not. *See* 10 U.S.C. § 2464(a). The statute also provides that the Secretary of Defense may waive the core designation. *See* 10 U.S.C. § 2462(b)(2). Plaintiffs allege under 10 U.S.C. § 2464 (b)(1), that if the Secretary of Defense waives the core designation of a workload, performance of such activity or function shall be considered for conversion to contractor performance in accordance with OMB Circular A-76. In addition, plaintiffs maintain that the Secretary of Defense did not waive the "core" designation at Newark, Kelly, and McClellan as set forth under § 2464, nor was the bidding by private contractors at Newark in accordance with Circular A-76.

According to 10 U.S.C. § 2469, the depot level maintenance or repair workload, such as the workload at Newark, Kelly and McClellan, whether it consisted of core or non-core logistics functions, should be changed to performance by a contractor using "merit-based selection procedures for competitions among all depot-level activities of the DoD; or competitive procedures for competitions among private and public sector entities." Further, under 10 U.S.C. § 2470, a depot level activity of the DoD shall be eligible to compete for the performance of any depot level maintenance and repair workloads of a Federal agency for which competitive procedures are used.

With regard to the workload at Newark, Kelly, and McClellan, plaintiffs maintain that during 1995 and 1996 defendants indicated an intent to allow performance of this workload by private contractors without using either "merit-based procedures for competitions among all depot-level activities of the DoD" or "competitive procedures for competitions among private and public sector activities." In addition, plaintiffs assert that defendants prohibited federal installations from bidding on the workloads at McClellan and Kelly and that defendants have indicated an intent to violate said sections in the future with regard to other workloads at those same bases.

II.

A motion to dismiss for failure to state a claim "should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). All well-pleaded allegations must be taken as true and be construed most favorably toward the non-movant. *See Schuer v. Rhodes*, 416 U.S. 232, 236 (1974). A 12(b)(6) motion to dismiss is directed

solely to the complaint and any exhibits attached to it. *See Roth Steel Prod. v. Sharon Steel Corp.*, 705 F.2d 134, 155 (6th Cir. 1983). The merits of the claims set forth in the complaint are not at issue on a motion to dismiss for failure to state a claim. Consequently, a complaint will be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) only if there is no law to support the claims, or if the facts alleged are insufficient to state a claim, or if on the face of the complaint there is an insurmountable bar to relief. *See Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 857, 858 (6th Cir. 1976). Rule 12(b)(6) must be read in conjunction with Fed. R. Civ. P. 8(a), which provides that a pleading for relief shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." 5A Wright & Miller, *Federal Practice and Procedure* § 1356 (1990). The moving party is entitled to relief only when the complaint fails to meet this liberal standard. *See id.*

On the other hand, more than bare assertions of legal conclusions are required to satisfy the notice pleading standard. *See Scheir v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988). "In practice, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory." *Id.* (emphasis in original, quotes omitted).

> "[w]e are not holding the pleader to an impossibly high standard; we recognize the policies behind rule 8 and the concept of notice pleading. A plaintiff will not be thrown out of court for failing to plead facts in support of every arcane element of his claim. But when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist."

Id. (quoting *O'Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977)).

III.

Plaintiffs argue that all workloads at Newark, Kelly, and McClellan have been designated as "core" functions and thus must be performed only by federal employees at DoD depots; they also assert that the DoD has forbidden Air Force depots from bidding to obtain some or all of these workloads. (Pls.[']] Comp. ¶¶ 3-17). In addition, plaintiffs assert that defendants violated 10 U.S.C. §§ 2464, 2469 and 2470 by permitting private sector bidders to compete in any way for any part of the Newark, Kelly, and McClellan workloads and by the DoD's alleged policy or anticipated policy of prohibiting depots from bidding.

Defendants argue that this Court does not possess subject matter jurisdiction, in either its constitutional or prudential dimension, to entertain plaintiffs' claims. (Defs.[']] Mot. to Dismiss at 16). In addition, defendants maintain that plaintiffs have failed to state a claim upon which relief can be granted. (Def.[']] Mot. to Dismiss at 31). Consequently, defendants assert that plaintiffs' claims are subject to dismissal under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. 12(b)(6).

A Constitutional Standing

For purposes of ruling on a motion to dismiss for lack of standing, the court must view the complaint in the light most favorable to the plaintiff, accepting as true all material allegations in the complaint. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975). Plaintiffs bear the burden of persuading the court that it possesses subject matter jurisdic-

tion. *S Rogers v. Stratton Industries Inc.*, 798 F.2d 913, 915 (6th Cir. 1986).

Article III of the United States Constitution limits the judicial power of United States Courts to the resolution of "cases" or "controversies." U.S. Const. Art. III, § 2, cl. 1. Article III's "case or controversy" requirement serves to distinguish "those disputes which are appropriately resolved through the judicial process," *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990), from those which are merely "generalized grievances" not arising from any specific injury to the complaining party. *Warth v. Seldin*, 422 U.S. 490 at 499 (1975).

To establish standing to sue in federal court, a plaintiff must satisfy certain minimum constitutional requirements. In particular, an individual plaintiff must show: (1) that he or she has suffered an "injury in fact;" (2) that there is a causal connection between the injury and the conduct complained of; and (3) that it is likely that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Failure to satisfy any one of the constitutional requirements mandates dismissal:

> The rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinations of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.

Warth, 422 U.S. 490 at 517-518 (1975).

First, plaintiffs must establish that they have suffered an "injury in fact." *Lujan*, 504 U.S. 55, 560-61 (1992). Defendants argue that the only plaintiffs even to suggest concrete injuries are the three who may lose their federal jobs at AGMC, but that their prospective loss does not result from any allegedly unlawful actions of the DoD. Instead, defendants maintain that those three plaintiffs' injuries are a direct result from the requirement to close AGMC pursuant to the base-closure law. Plaintiffs assert, however, that they have suffered injury from defendants' failure to comply with 10 U.S.C. §§ 2464, 2469 and 2470.

In *Dalton v. Specter*, 511 U.S. 462 at 476 (1994), the Court clearly held that the Defense Base Closure and Realignment Act was not revewable under the APA because, "where a statute, such as the 1990 Act, commits decision making to the discretion of the President, judicial review of the President's decision is not available." In the present case, the closure of Newark, Kelly, McClellan, and AGMC was directly premised upon the 1993 and 1995 Base Realignment and Closure Commission Reports. The Commission Reports were pursuant to and in accordance with the Defense Base Closure and Realignment Act of 1990. Therefore, the loss of jobs at those air force bases and any injuries which plaintiffs have suffered due to their closure cannot be challenged by plaintiffs and thus cannot be used to establish an injury in fact.

Defendants assert that the other individual plaintiffs do not allege concrete or current injury. Defendants maintain that all of the injuries alleged by plaintiffs are speculative and do not satisfy the first prong of constitutional standing. Plaintiffs, however, argue that the government's illegal actions have already or will soon cause them to lose their jobs, thereby causing injury.

In the case at bar, a number of individual plaintiffs assert that any transfer of "core" workloads from Newark, Kelly, and McClellan to private contractors would harm their federal career prospects. (Pls.['] Compl. ¶¶ 7, 8, 9, 10, 12, 14, 15, 16, 17). Certain individual plaintiffs maintain that their career prospects were harmed because their depots were not permitted to bid for certain workloads, (Pls.['] Comp. ¶¶ 12, 13), and that if a depot were to bid on and win the right to perform the workload, the plaintiffs would have the option of possibly working at that depot. (Pls.['] Compl. ¶¶ 7, 8, 9, 10, 14, 15, 16, 17). In addition, certain individual plaintiffs assert that, if a reduction in force ("RIF") were to occur in the future because their employing depots were unable to gain workloads from closing facilities, or due to a lack of work generally stemming from some other cause, more senior employees would compete for platintiffs' posittions and would displace them. (Pls.['] Compl. ¶¶ 4, 5, 11, 12, 13). Two individual plaintiffs who are not currently employed by the Air Force assert that, if the air force base formerly employing those plaintiffs had bid on and won a workload, those plaintiffs' chances of remaining employed or being reemployed by that air force base would improve. (Pls.'['] Comp. ¶¶ 16,17).

The Supreme Court has set forth that a plaintiff's injury must be "concrete and particularized." *Lujan*, 504 U.S. 555, 560 (1992). The alleged injury must be "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* at 560. Although imminence "is concededly a somewhat elastic concept, [its purpose] is to ensure that the injury is not too speculative for Article III purposes—that the injury is certainly impending." *Id.* at 565 n. 2 (citations omitted).

In the present case, plaintiffs set forth the possibility that at some point in the future their situation may be adversely affected by one or another depot not obtaining the work of a closing facility. These speculative injuries do not support a finding of the 'actual and imminent' injury required under Article III. Further, plaintiffs do not allege injury that is "certainly impending," which would constitute injury in fact; thus, do not meet the constitutional threshold.[1] *See Brunet v. City of Columbus*, 1 F.3d 390, 396 (6th Cir. 1993).[2]

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[1] Plaintiffs assert that they have satisfied the requirements for both constitutional and prudential standing and cite to *Diebold*, 947 F.2d 787 (1991). However, the Sixth Circuit in *Diebold* stated that, "[w]e do not reach the standing issue or any issue on the merits." *Id.* at 789. The Sixth Circuit then remanded the case back to the district court for further proceedings, including the development of the facts and law governing plaintiffs' standing.

On remand the district court concluded that plaintiffs had established constitutional standing. Further, the district court held that plaintiffs had established prudential standing under 10 U.S.C. § 2464, specifically, Circular A-76.

The Court does not find the district court's determination in *Diebold* to be persuasive under the facts of this case. Unlike *Diebold*, the present case implicates statutes and issues beyond a "contracting out" decision under Circular A-76. Here, plaintiffs are not directly affected parties under Circular A-76. Further, plaintiffs in the instant case have not established an injury in fact as required under Article III standing. *See Diebold*, 947 F.2d 787, 811-15 (1991) (Wellford, dissenting).

[2] Second, plaintiffs must establish that there injury can be "fairly traced to the challenged action" (traceability). *Valley Forge*, 454 U.S. 464, 472 (1982). Finally, Article III standing requires plaintiffs to prove that their injury is "likely to be addressed by a favorable decision" (redressability). *Id.*

The Court finds it unnecessary to address the traceability or redressability prongs of standing. The Court's finding that plaintiffs did not establish an injury in fact as required under the first prong of Article III standing is dispositive of the constitutional standing issue.

Defendants also argue that neither organizational plaintiff has standing. Plaintiffs assert that both the AFGE and Hill have established standing to sue. The AFGE does not allege injury itself, but sues in a representational capacity on behalf of its members. (Pls.['] Compl. ¶ 3). Hill asserts that the state of Utah has been injured as a result of the DoD prohibiting the Hill Air Force Base from bidding on the workloads at Newark, Kelly, and McClellan. (Pls.['] Compl. ¶ 11).

A union may invoke the doctrine of "associational," or "representational," standing, which permits organizations, in certain circumstances, to premise standing entirely upon injuries suffered by their members. *See UAW v. Brock*, 477 U.S. 274, 281-82 (1986). This doctrine does not, however, eliminate the constitutional requirement of a live case or controversy between the parties, but it recognizes that injury to an organization's members may satisfy Article III and allows the organization to litigate in federal court on their behalf. *See id.* at 281. The test for associational standing is like the basic standing inquiry—tripartite. The plaintiff association must show that (a) at least one of its members possesses standing to sue in his or her own right—i.e., that the member can satisfy the three requirements of injury, traceability and redressability; (b) the interests the suit seeks to vindidate are germane to its purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See id.* at 282.

To establish the right to bring the instant action, the AFGE and Hill must demonstrate compliance with the standing prerequisites. As the Court discussed earlier, neither the AFGE nor Hill can do so. Because the AFGE union members, the federal employees at the Hill Air Force Base, and the residents of the state of Utah, are

unable to meet the injury in fact prong of the basic standing inquiry, they lack standing. As a result, the AFGE and Hill are unable to fulfill the first condition for associational standing—that at least one member possess standing to sue as an individual. In light of this deficiency, the Court will not consider whether the AFGE or Hill could satisfy the other two prongs of the associational standing test. In sum, the Court finds that plaintiffs cannot satisfy the minimum constitutional requirements for standing.[3]

B. Prudential Standing

In addition to the constitutional requirements, the Supreme Court has recognized two significant prudential limits on standing. First, a plaintiff must be within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Valley Forge*, 454 U.S. 464 at 472 (quoting *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970)). Second, the Supreme Court has refrained from adjudicating "abstract questions of wide public significance" that amount to "generalized grievances," pervasively shared and most appropriately addressed in the representative branches. *Valley Forge*, 454 U.S. 464 at 475 (quoting *Warth v. Seldin*, 422 U.S. 490 at 499-500 (1975)).

Defendants claim that plaintiffs cannot overcome the prudential limitation on standing because plaintiffs are not within the "zone or interests" protected by or regulated under the statutes at issue. Plaintiffs assert that

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[3] Hill further lacks standing because the injuries which it sets forth—an injury to the community of Utah and to the state of Utah—are precisely the sort of generalized grievances that the Supreme Court has held will not sustain standing. *See Valley Forge*, 454 U.S. at 475.

they are within the zone of interests regulated under 10 U.S.C. §§ 2464, 2469 and 2470.[4]

Under the zone of interest test, a plaintiff is denied the right of review if the "plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *National Fed'n of Fed. Employees v. Cheney*, 883 F.2d 1038, 1048 (1989) (quoting *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987)). The zone of interest test requires "less than a showing of congressional intent to benefit but more than a 'marginal [ ] rela[tionship]' to the statutory purposes." *Id.* at 1048 (brackets in original).

In the present case, the language of §§ 2464, 2469 and 2470, upon which plaintiffs rely, demonstrates that Congress did not contemplate or intend for those statutes to protect the jobs of individual federal employees. First, the provisions of 10 U.S.C. § 2464(a)(1) state, "It is essential for the national defense that the Department of Defense activities maintain a logistics capability . . . to ensure a ready and controlled source of technical competence and resources necessary to ensure effective and timely response to a mobilization, national defense contingency situations, and other emergency requirements."

Clearly, the langauge of § 2464(a) indicates an intent by Congress to ensure that the national defense is prepared at all times, and the protection of federal employees jobs bears less than a marginal relationship to that statutory

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[4] Plaintiffs maintain that they have satisfied the prudential limitations on standing and that they are within the "zone of interests" contemplated by the statutes at issue in this case. To support this contention plaintiffs again cite *Diebold*, 947 F.2d 787 1991). *See supra*, note 1.

purpose. Therefore, the Court finds that plaintiffs are not within the zone of interests of § 2464(a).

In addressing § 2464(b)(2), the Court finds persuasive Senior Circuit Judge Wellford's dissent in *Diebold v. United States*, 947 F.2d 787 (1991). In *Diebold* Judge Wellford specifically addressed whether a federal employee's job interests are within the zone of interests contemplated under Circular A-76 contained in § 2464. Plaintiffs, who were civilian employees of the Army, brought an action challenging the Army's decision to privatize food service operations at Fort Knox. The Sixth Circuit did not reach the standing issue; however, the court held that a contracting-out decision in a wrongful privatization case is reviewable in a federal district court under the APA. . *Id.*

Judge Wellford, in addressing why plaintiffs did not have standing under Circular A-76, stated:

> Nothing in the legislative history of the 1921 [Budget and Accounting] Act suggests that Congress contemplated the protection of employment of federal employees. Indeed, Representative Good's presentation of the 1921 Act to 67th Congress suggests a congressional purpose inconsistent with those interests. That is, the Act would require that some federal employees be terminated under the new budgeting process.

Diebold, 947 F.2d 787 at 811 (1991) (Wellford, dissenting) (quoting *National Federal Employees v. Cheney*, 883 F.2d 1038, 1046 (D.C. Cir. 1989)). Judge Wellford went on to state:

> [C]ongress carefully crafted a two-pronged checks and balances budgeting process to coordinate the

> United States budgeting process, eliminate duplication of services, and promote efficiency. Congress knew that some federal employees would be adversely affected and, instead of giving these employees some recourse, intentionally removed the director of the Bureau of Budget from as much external pressure as possible so that he could make the "hard" decision to reduce the employee force where necessary. At most federal employees' interests are marginally related to this centralized annual budgeting process balanced between the Executive and Legislative branches.

Id. at 812. (Wellford, dissenting) (quoting *Cheney*, 883 F.2d at 1048). Judge Wellford clearly illustrated that federal employees do not have standing to sue under Circular A-76 because protection of federal jobs is not in the zone of interests contemplated under 10 U.S.C. § 2464(b)(2).

In the present case, plaintiffs rely on § 2464 as a basis for their injuries. Specifically, plaintiffs maintain that their injuries arise both from the Secretary of Defense's failure to waive the core logistic designation at Newark, Kelly, and McClellan and from the government's failure to implement Circular A-76. The legislative history and the plain language of 10 U.S.C. § 2464, nevertheless, does not reflect an intent to protect federal jobs. Instead, the language of § 2464 sets forth that the purpose of the statute is the protection and preservation of national defense readiness, and he promotion of budgeting efficiency.

Moreover, it does not appear to the Court that § 2464 (b)(2) is applicable under the facts of this case. The Circular A-76 cost comparison process involves a comparison of *continued* performance in-place versus performance by a competitively awarded contract. In the

case at bar, continued in-place performance at the existing facilities is not an option, and, as a result, no such cost comparison can be made. Therefore, Circular A-76 has no application.

Based on the above, the Court finds that the protection of plaintiffs' federal jobs is not within the zone of interests contemplated under 10 U.S.C. § 2464; therefore, plaintiffs lack prudential standing under that statute.

Plaintiffs also assert violations under 10 U.S.C. § 2469. Congress designed § 2469 to address competition between DoD depots and between public and private entities in certain circumstances. The provisions under § 2469 extend to private and public sector entities. Section 2469, however, was promulgated by Congress in the hopes that the procedures specified under the statute would reduce costs and improve the overall efficiency of DoD depot operations. *See* H.R. Conf. 103-357, 103d Cong., 1st Sess. at 656 (1993). Plaintiffs' interests in obtaining the workloads from air force bases slated for closure and keeping their federal jobs are inconsistent with Congress's interest in achieving lower costs and improving the overall efficiency of the DoD depot operations. Therefore, the Court finds that plaintiffs are not within the zone of interests contemplated under § 2469.

Similarly, § 2470 simply provides that depot level activities of the DoD shall be "eligible" to compete for maintenance and repair workloads. Nothing contained in § 2470 suggests that this eligibility was intended to benefit specific federal workers. Further, nothing in this section suggests that any particular base is required to be allowed to compete for any particular workload. Therefore, based upon the language in the statute, the Court finds that plaintiffs are not within the zone of interests contemplated under § 2470.

Furthermore, it does not appear to the Court that §§ 2469 and 2470 are applicable under the facts of this case. The language of §§ 2469 and 2470 indicate that they are designed to apply to *ongoing* functions at a depot. In the present case, Newark, Kelly, and McClellan, as well as other air force depots, have been slated for closure and as a result no ongoing activities will be conducted at those depots. Therefore, sections 2469 and 2470 have no application.

Based on the above, the Court finds plaintiffs interests in protecting their federal jobs are inconsistent with the purposes of 10 U.S.C. §§ 2464, 2469 and 2470. Consequently, plaintiffs do not have prudential standing based on those statutes.

IV.

The Court has already determined that plaintiffs lack standing to assert claims under 10 U.S.C. §§ 2464, 2469 and 2470; however, as an alternative basis for its holding, the Court will proceed to address whether the issues presented in this case involve matters which are inappropriate for judicial consideration—"nonjusticiability."

The Supreme Court in addressing nonjusticiability explained, "[c]onsideration of the cause is not wholly and immediatelly foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker v. Carr*, 369 U.S. 186 at 198 (1962). A controversy is nonjusticiable—i.e., it involves a political question—where there is "a textually demonstrable constitutional commitment of the issue to coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it. . . ." *Nixon v. United States*, 506 U.S. 224 at 228 (1993) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

A nonjusticiable political question arises when any one of the following circumstances is present: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving the matter; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for devotion to a political decision already made; (6) or the potentiality of embarrassment from eclectic pronouncements by various departments on one question. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 941 (1983).

In this case, we must examine 10 U.S.C. § 2464, to determine the scope of authority conferred upon the Secretary of Defense by Congress. Under § 2464, the Secretary of Defense shall identify the logistics activities that are necessary to maintain the logistics capabilities necessary to ensure a ready and controlled source of technical competence for the national defense. "The Secretary of Defense may waive . . . any such logistics activity or function . . . any such waiver shall be made under regulations prescribed by the Secretary and shall be based on a *determination by the Secretary* that Government performance of the activity or function is no longer required for national defense reasons. Such regulations shall include criteria for determining whether Government performance of any such activity or functions is no longer required for national defense reasons." 10 U.S.C. § 2464(b)(2) (emphasis added).

Plaintiffs maintain that they were injured because the Secretary of Defense did not waive the core designation

at Newark, Kelly, and McClellan in accordance with § 2464. Consequently, plaintiffs claim that the workloads at Newark, Kelly, and McClellan should only be performed by federal employees. Section 2464, however, grants the Secretary of Defense virtually unbridled discretion in determining when to waive the core designation at a depot, and sets forth no standards by which to evaluate the Secretary's decision.[5] Section 2464 clearly indicates the presence of a political question because the statute involves issues of national security which the Court is not competent to evaluate.

In addition, there are no judicially discoverable or manageable standards for resolving the Secretary of Defense's failure to comply with § 2464. Congress purposely gave the Secretary essentially sole discretion in determining the criteria for waiving the core designation, presumably because the Secretary is in the best position to determine issues pertaining to national security. Therefore, the Court cannot determine that the workloads at Newark, Kelly, and McClellan, or any other base which the Secretary determines should be designated as non-core, should be performed only by federal employees, because this would require the Court to delve into national security issues.[6]

Furthermore, § 2464(b)(2), which addresses Circular A-76, has no application under the facts of this case. As discussed previously, Circular A-76 is the cost comparison of continued in-place performance at an existing facility versus performance by a competitively awarded contract.

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[5] In this sense, in the instant case there is no "law to apply" to evaluate the Secretary's designation.

[6] To illustrate this point, it is worth considering the futility of ordering the Secretary to comply with the waiver requirement of § 2464. The Secretary could then simply promulgate a set of rules that would allow him to waive the core designation, and the injunction would have been a pointless exercise.

Here, in-place performance at the existing facilities is not an option; therefore, Circular A-75 has no application.

Based on the above, the Court finds that 10 U.S.C. § 2464 presents a nonjusticiable political question which prohibits judicial review.

Plaintiffs also assert injuries under 10 U.S.C. §§ 2469 and 2470. Under § 2469 the Secretary of Defense shall ensure that the performance of depot maintenance and repair workloads are changed to performance by a contractor using merit-based selection procedures for competitions among all depot-level activities of the DoD; or competitive procedures for competitions among private and public sector entities. Under § 2470, a depot level activity of the DoD shall be eligible to compete for the performance of any depot level maintenance and repair workloads of a Federal agency for which competitive procedures are used.

Sections 2469 and 2470 simply do not provide criteria for determining whether specific DoD activities should compete for workloads. Further, the statutes fail to provide standards by which the DoD should abide. There is nothing in the language of the statutes themselves to indicate that they were intended to affect the DoD's authority concerning competition or the allocation of work generally among depots within the DoD, or within the same military department, for the work of that department. In addition, neither § 2469 nor § 2470 provides specific guidance or requirements as to which depots shall compete or be considered for various workloads.

The controversy over §§ 2469 and 2470 present nonjusticiable issues. Under both § 2469 and § 2470 there is a lack of judicially discoverable and manageable standards for resolving plaintiffs' alleged injuries. Neither statute provides standards upon which the Court could impose

that the DoD abide by. The statutes clearly grant the DoD and the Secretary of Defense the authority to determine how the competitions between workloads should be constructed, and further, how the allocation of work among DoD depots should be divided. These statutes do not provide the Court with any standards by which to evaluate or resolve matters of DoD workload allocation, as these matters concern issues of national defense readiness and security, matters which the courts are not qualified to address.

Furthermore, it does not appear to the Court that §§ 2469 and 2470 are applicable under the facts of this case. As discussed previously, the language of §§ 2469 and 2470 assume *ongoing* functions at a depot. In the present case, Newark, Kelly, and McClellan, as well as other air force depots, have been slated for closure and as a result no ongoing activities will be conducted at those depots. Therefore, sections 2469 and 2470 have no application.

Based on the above, the Court finds that §§ 2464, 2469, and 2470 implicate political questions which are nonjusticiable. Judicial review, therefore, is inappropriate.

V.

Based on the foregoing, the Court GRANTS defendants' motion to dismiss. The Court DENIES plaintiffs' motion for a preliminary injunction and motion for a temporary restraining order.

The clerk shall remove this case from the Court's pending cases and motions lists.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH
Judge
United States District Court

[Filed Mar. 18, 1998]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C2-96-283
Judge Smith
Magistrate Judge Kemp

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, *et al.*,
Plaintiff,

vs

WILLIAM J. CLINTON,
as President of the United States, *et al.*,
Defendants.

JUDGMENT IN A CIVIL CASE

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered:

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Opinion and Order filed March 18, 1998, defendants' Motion to Dismiss is GRANTED, and plaintiffs' Motion for a Preliminary Injunction and Motion for Temporary Restraining Order are DENIED. This action is hereby DISMISSED.

Date: March 18, 1998

KENNETH J. MURPHY
Clerk

/s/ G. W. Wellman
By Deputy Clerk

APPENDIX C

[Filed Jun. 6, 1997]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-96-283
JUDGE SMITH
Magistrate Judge Kemp

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, *et al.*,

Plaintiffs,

v.

WILLIAM J. CLINTON,
as President of the United States, *et al.*,

Defendants.

ORDER

Plaintiffs challenge, *inter alia*, "how the defendants have redistributed and/or plan to redistribute the workload of the Newark AFB after it was ordered to be closed by the Base Realignment and Closure Commission Report of 1993." Pl. mot. at 2 (Doc. 17). On June 28, 1996, defendants moved to dismiss the lawsuit under Fed. R. Civ. P. 12(b)(1) and (6), arguing that plaintiffs lack standing, that the statutes upon which plaintiffs rely do not provide for private causes of action, and that the case presents nonjusticiable issues (Doc. 15).

On July 15, 1996, plaintiffs moved under S.D. Ohio L.R. 7.2(e) to convert defendants' motion to dismiss to

a motion for summary judgment, and to allow discovery before requiring plaintiffs to respond to the summary judgment motion. (Doc. 17). For the reasons that follow the Court denies plaintiffs' motion to convert.

The chief ground for plaintiffs' motion to convert is that defendants attached several exhibits to their motion to dismiss. A Rule 12(b)(6) motion to dismiss is directed solely to the complaint and any exhibits attached to it. *Haffey v. Taft*, 803 F. Supp. 121, 127 (S.D. Ohio 1992). Nonetheless, the Court may consider certain materials outside the complaint without converting a motion to dismiss to a motion for summary judgment. *See Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 445 (6th Cir. 1997); *Plassman v. City of Wauseon*, 1996 WL 254662, at *3 (6th Cir. 1996); *Song v. City of Elyria*, 985 F.2d 840, 842 (6th Cir. 1993; *see also Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.), *cert. denied*, 114 S.Ct. 2704 (1994); *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993).

Here, the exhibits consist only of public documents susceptible to judicial notice, and an affidavit of one of the plaintiffs. As defendants correctly note, attachment of these exhibits does not, in these circumstances, mandate conversion to a summary judgment motion.

Furthermore, the Court finds that defendants' motion to dismiss raises legal issues which can and should be addressed without reference to evidentiary materials and without discovery. Plaintiffs' reply to defendants' opposition to their motion to convert demonstrates this point. Although plaintiffs' reply was supposed to show why discovery is required, a good deal of it is devoted to legal arguments the Court would properly consider in determining whether to grant or deny defendants' motion to dismiss. For example, on page 18 of their reply, following

several pages of discussion about the standing issue, plaintiffs declare, "all criteria to establish standing have thus been met by the plaintiffs."

After this, plaintiffs argue that "since on page 47 of their memorandum defendants seem to argue that the workload at Newark AFB was not core workload as that term is used in Section 2464 *discovery on this point is extremely important and necessary,*" (emphasis in original). Similarly, plaintiffs argue that defendants, in their motion to dismiss, dispute plaintiffs' allegation in their complaint that the Secretary of Defense never complied with the waiver requirements of 10 U.S.C. § 2464(b).

The Court rejects plaintiffs' arguments. In examining whether plaintiffs' complaint is subject to dismissal under Fed. R. Civ. P. 12(b), the Court will accept as true all well pleaded facts in plaintiffs' complaint. Therefore, it is not enough that defendants make or suggest some contrary factual assertions in their motion to dismiss. The Court will ignore such assertions by defendants in ruling on the motion to dismiss. Hence, for example, for purposes of addressing the motion to dismiss, the Court accepts as true plaintiffs' factual assertion in their complaint that all of the workload at the Newark Air Force Base is "core" work. Com. ¶ 1 (Doc. 1).

In sum, the Court finds that defendants' motion to dismiss raises legal issues which may be determined by reference to the complaint without discovery. The Court therefore DENIES plaintiffs' motion to convert defendants' motion to dismiss to a motion for summary judgment (Doc. 17).

Plaintiffs shall, within twenty-one (21) days after the date of this order, file and serve their memorandum in opposition to defendants' motion to dismiss.

The Clerk shall remove Doc. 17 from the Court's pending motions list.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH
Judge
United States District Court

APPENDIX D

[Filed Sep. 7, 1999]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

98-3385

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, *et al.*,
Plaintiffs-Appellants,

v.

WILLIAM J. CLINTON,
President of the United States, *et al.*,
Defendants-Appellees.

BEFORE: SILER, DAUGHTREY, and GILMAN, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX E

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of differeont States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATUTORY PROVISIONS

5 U.S.C.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

TITLE 10. ARMED FORCES
SUBTITLE A. GENERAL MILITARY LAW
PART IV. SERVICE, SUPPLY, AND PROCUREMENT
CHAPTER 146. CONTRACTING FOR PERFORMANCE OF CIVILIAN COMMERCIAL OR INDUSTRIAL TYPE FUNCTIONS

10 USCS § 2464 (1996)

§ 2464. Core logistics functions

(a) Necessity for core logistics capability.

(1) It is essential for the national defense that Department of Defense activities maintain a logistics capability (including personnel, equipment, and facilities) to ensure a ready and controlled source of technical competence and resources necessary to ensure effective and timely response to a mobilization, national defense contingency situations, and other emergency requirements.

(2) The Secretary of Defense shall identify those logistics activities that are necessary to maintain the logistics capability described in paragraph (1).

(b) Limitation on contracting.

(1) Except as provided in paragraph (2), performance of a logistics activity identified by the Secretary under subsection (a)(2), and performance of a function of the Department of Defense described in section 1231(b) of the Department of Defense Authorization Act, 1986 (Public Law 99-145; 99 Stat. 731) [uncodified], may not be contracted for performance by non-Government personnel under the procedures and requirements of Office of Management and Budget Circular A-76 or any successor administrative regulation or policy (hereinafter in this section referred to as OMB Circular A-76).

(2) The Secretary of Defense may waive paragraph (1) in the case of any such logistics activity or function and provide that performance of such activity or function shall be considered for conversion to contractor performance in accordance with OMB Circular A-76. Any such waiver shall be made under regulations prescribed by the Secretary and shall be based on a determination by the Secretary that Government performance of the activity or function is no longer required for national defense reasons. Such regulations shall include criteria for determining whether Government performance of any such activity or function is no longer required for national defense reasons.

(3) A waiver under paragraph (2) may not take effect until the end of the 30-day period beginning on the date on which the Secretary submits a report on the waiver to the Committee on Armed Services and the Committee on Appropriations of the Senate and the Committee on National Security and the Committee on Appropriations of the House of Representatives.

(4) [Deleted]

10 U.S.C. § 2464 (1997)

§ 2464. Core logistics capabilities

(a) Necessity for core logistics capabilities.—(1) It is essential for the national defense that the Department of Defense maintain a core logistics capability that is Government-owned and Government-operated (including Government personnel and Government-owned and Government-operated equipment and facilities) to ensure a ready and controlled source of technical competence and resources necessary to ensure effective and timely response to a mobilization, national defense contingency situations, and other emergency requirements.

(2) The Secretary of Defense shall identify the core logistics capabilities described in paragraph (1) and the workload required to maintain those capabilities.

(3) The core logistics capabilities identified under paragraphs (1) and (2) shall include those capabilities that are necessary to maintain and repair the weapon systems and other military equipment (including mission-essential weapon systems or materiel not later than four years after achieving initial operational capability, but excluding systems and equipment under special access programs, nuclear air-craft carriers, and commercial items described in paragraph (5)) that are identified by the Secretary, in consultation with the Chairman of the Joint Chiefs of Staff, as necessary to enable the armed forces to fulfill the strategic and contingency plans prepared by the Chairman of the Joint Chiefs of Staff under esction 153(a) of this title.

(4) The Secretary of Defense shall require the performance of core logistics workloads necessary to maintain the core logistics capabilities identified under paragraphs

(1), (2), and (3) at Government-owned, Government-operated facilities of the Department of Defense (including Government-owned, Government-operated facilities of a military department) and shall assign such facilities sufficient workload to ensure cost efficiency and technical competence in peacetime while preserving the surge capacity and reconstitution capabilities necessary to support fully the strategic and contingency plans referred to in paragraph (3).

(5) The commercial items covered by paragraph (3) are commercial items that have been sold or leased in substantial quantities to the general public and are purchased without modification in the same form that they are sold in the commercial marketplace, or with minor modifications to meet Federal Government requirements.

(b) Limitation on contracting.—(1) Except as provided in paragraph (2), performance of workload needed to maintain a logistics capability identified by the Secretary under subsection (a)(2) may not be contracted for performance by non-Government personnel under the procedures and requirements of Office of Management and Budget Circular A-76 or any successor administrative regulation or policy (hereinafter in this section referred to as OMB Circular A-76).

(2) The Secretary of Defense may waive paragraph (1) in the case of any such logistics capability and provide that performance of the workload needed to maintain that capability shall be considered for conversion to contractor performance in accordance with OMB Circular A-76. Any such waiver shall be made under regulations prescribed by the Secretary and shall be based on a determination by the Secretary that Government performance of the workload is no longer required for national defense rea-

sons. Such regulations shall include criteria for determining whether Government performance of any such workload is no longer required for national defense reasons.

(3)(A) A waiver under paragraph (2) may not take effect until the expiration of the first period of 30 days of continuous session of Congress that begins on or after the date on which the Secretary submits a report on the waiver to the Committee on Armed Services and the Committee on Appropriations of the Senate and the Committee on National Security and the Committee on Appropriations of the House of Representatives.

(B) For the purposes of subparagraph (A)—

(i) continuity of session is broken only by an adjournment of Congress sine die; and

(ii) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of any period of time in which Congress is in continuous session.

TITLE 10. ARMED FORCES
SUBTITLE A. GENERAL MILITARY LAW
PART IV. SERVICE, SUPPLY, AND PROCUREMENT
CHAPTER 146. CONTRACTING FOR PERFORMANCE OF CIVILIAN COMMERCIAL OR INDUSTRIAL TYPE FUNCTIONS

10 USCS § 2467 (1998)

§ 2467. Cost comparison: requirements with respect to retirement costs and consultation with employees

(a) Requirement to include retirement costs.

(1) In any comparison conducted by the Department of Defense under Office of Management and Budget Circular A-76 (or any successor administrative regulation or policy) the cost of performing commercial activities by Department of Defense personnel and the cost of performing such activities by contractor personnel, the Secretary of Defense shall include retirement costs (as described in paragraph (2) and (3)) of both the Department of Defense and the contractor.

(2) The retirement system costs of the Department of Defense sh. ll include (to the extent applicable) the following:

(A) The cost of the Federal Employees' Retirement System, valued by using the normal-cost percentage (as defined by section 8401(23) of title 5, United States Code).

(B) The cost of the Civil Service Retirement System under subchapter III of chapter 83 of such title [5 USCS §§ 8331 et seq.].

(C) The cost of the thrift savings plan under subchapter III of chaper 84 of such title 5 [5 USCS §§ 8431 et seq.].

(D) The cost of the old age, survivors, and disability insurance taxes imposed under section 3111(a) of the Internal Revenue Code of 1986 [26 USCS § 3111(a)].

(3) The retirement system costs of the contractor shall include the cost of the old age, survivors, and disability insurance taxes imposed under section 3111(a) of the Internal Revenue Code of 1986 [26 USCS § 3111(a)], the cost of thrift or other retirement savings plans, and other relevant retirement costs.

(b) Requirement to consult DOD employees.

(1) Each officer or employee of the Department of Defense responsible for determining under Office of Management and Budget Circular A-76 whether to convert to contractor performance any commercial activity of the Department—

(A) shall, at least monthly during the development and preparation of the performance work statement and the management efficiency study used in making that determination, consult with civilian employees who will be affected by that determination and consider the views of such employees on the development and preparation of that statement and that study; and

(B) may consult with such employees on other matters relating to that determination.

(2)(A) In the case of employees represented by a labor organization accorded exclusive recognition under 7111 of title 5, United States Code, consultation with representatives of that labor organization shall satisfy the consultation requirement in paragraph (1).

(B) In the case of employees other than employees referred to in subparagraph (A), consultation with appropriate representatives of those employees shall satisfy the consultation requirement in paragraph (1).

(3) The Secretary of Defense shall prescribe regulations to carry out this subsection. The regulations shall include provisions for the selection or designation of appropriate representatives of employees referred to in paragraph (2)(B) for purposes of consultation required by paragraph (1).

TITLE 10. ARMED FORCES
SUBTITLE A. GENERAL MILITARY LAW
PART IV. SERVICE, SUPPLY, AND PROCUREMENT
CHAPTER 146. CONTRACTING FOR PERFORMANCE OF CIVILIAN COMMERCIAL OR INDUSTRIAL TYPE FUNCTIONS

10 USCS § 2469 (1998)

§ 2469. Contracts to perform workloads previously performed by depot-level activities of the Department of Defense: requirement of competition

(a) Requirement for competition. The Secretary of Defense shall ensure that the performance of a depot-level maintenance and repair workload described in subsection (b) is not changed to performance by a contractor or by another depot-level activity of the Department of Defense unless the change is made using—

(1) merit-based selection procedures for competitions among all depot-level activities of the Department of Defense; or

(2) competitive procedures for competition among private and public sector entities.

(b) Scope. Subsection (a) applies to any depot-level maintenance and repair workload that has a value of not less than $3,000,000 and is being performed by a depot-level activity of the Department of Defense.

(c) Inapplicability of OMB Circular A-76. Office of Management and Budget Circular A-76 (or any successor administration regulation or policy) does not apply to a performance change to which subsection (a) applies.